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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-769

AUBREY D. HANSON d/b/a HANSON PAINT & GLASS COMPANY,

Petitioner,

vs.

PITTSBURGH PLATE GLASS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above captioned case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 482 F.2d 220. A copy of the Court of Appeals' opinion is appended hereto as provided by Rule 23(1)(i).

JURISDICTION

The judgment of the Court of Appeals was rendered on June 25, 1973, and rehearing was denied on August 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Can the "good faith meeting competition" defense of Section 2(b) of the Robinson-Patman Act properly be invoked when price discrimination is utilized to selectively eliminate a competitor and to generally increase the share of the market, rather than as a defensive measure to retain customers?

2. Can the competitive injury which occurs when one customer is given a lower price than others, be negated by the fact that the purchaser discriminated against had available comparable products from other suppliers or manufacturers at equivalent prices, so as to constitute a complete defense to an action under the Robinson-Patman Act?

3. Did the Court of Appeals err in reversing and rendering the judgment based on the jury verdict on the basis that a directed verdict should have been granted by the trial court because certain "cost justification" defenses were established as a matter of law, when such defenses were not asserted as a basis for the Defendant's Motion for Directed Verdict, and were not raised factually by the evidence adduced at trial.

4. Did the appellate court err in reversing and rendering the judgment based on the jury verdict by concluding that

the "good faith meeting competition" defense was established as a matter of law, where the evidence in the record, though not disputed factually, is subject to different inferences or interpretations. Closely related is the question of whether the appellate court failed to apply the proper standard for review on appeal by failing to consider the evidence in the record in the light most favorable to supporting the jury's verdict and the party opposing the motion for directed verdict.

5. Did the appellate court err by substituting its opinion for that of the jury as to the causation of the Plaintiff's financial failure, in direct contravention of this Court's pronouncement in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, at 566 (1931).

These represent the essential legal questions proposed by this petition. The error asserted by the Court of Appeals' resolution of these questions, framed in relation to Rule 19, appears hereinafter under the section on Reasons for Granting Writ.

STATUTES INVOLVED

The pertinent provisions of the Clayton Act, as amended by the Robinson-Patman Act, or as follows:

15 U.S.C.A., Sec. 13(a) states:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of

Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *."

15 U.S.C.A., Sec. 13(b) states:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." See 15 U.S.C.A., Sec. 13.

STATEMENT OF THE CASE

This is a suit alleging a violation of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C.A., Sec.

13, et seq.), and jurisdiction of the District Court was invoked under 28 U.S.C.A., Sec. 1331. The Plaintiff Aubrey Hanson began to work for the Defendant Pittsburgh Plate Glass Company (hereinafter referred to as PPG) in 1927 as a glass cutter. He progressed to a salesman and later was awarded the authorized distributorship for PPG products in 1946 when he established his own dealership in Marshall, Texas. Hanson spent thousands of dollars advertising and promoting the PPG line of products and countless hours of his energy establishing himself as the PPG dealer in the East Texas area. He followed the PPG promotional scheme of painting his trucks as well as engaging in joint promotional advertisements. In competition with several independent glass dealerships in surrounding East Texas towns, he sold PPG products to the general public and developed several major customers such as various automobile dealerships.

In 1952, another independent dealer, Martex Glass, commenced doing business in Marshall as the recognized distributor for another manufacturer, the Shatterproof Glass Company. Between 1948-1955, Hanson's business prospered and he averaged a net profit of some $12,892.00 per year. Then in 1956, according to the undisputed evidence, PPG put a sales representative in the East Texas area who began to call on Hanson's major customers, such as the automobile dealerships, and began to sell these customers the same PPG products at a lower price than was offered to Hanson. Furthermore, PPG began to sell at the same lower prices to Martex and other dealers competing with Hanson in surrounding cities.

The evidence of thousands of invoices in the record demonstrate that throughout the period involved in the suit virtually every sale by PPG to Martex and every other

competing dealer, as well as Hanson's former customers, was at a lower price than that given to Hanson, supposedly in order to meet the price being offered by other manufacturers such as Safelite or Shatterproof or similar products. However, despite repeated requests, PPG steadfastly refused throughout this period to give Hanson, the authorized PPG dealer, these lower prices, although every other dealer and many of his former customers, in every instance, was given the "competition meeting" price by PPG. Furthermore, not only was Hanson singled out and alone denied the lower prices, PPG continuously concealed this fact from Hanson that other dealers and customers were being given the benefit of the "competition meeting" price. Thus, through 1965, the last year that Hanson's business was effectively in operation, he continued to buy in excess of 90% of his merchandise from PPG. Not surprisingly, Hanson found it difficult to compete and his business steadily deteriorated. He lost money every year after 1956, and while he didn't actually close his doors until 1968, for all practical purposes his business was finished by 1965. Without dispute, the net result is that the Plaintiff Hanson is now removed from the market, and PPG now sells direct to most of the former major customers of Hanson, as well as to his former competitors such as Martex and other independent glass dealers in the East Texas area.

In 1968, Hanson filed suit alleging a violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. At trial, the Defendant contended that the lower prices given to Hanson's customers and competing dealers were lawful under Section 2(b), and introduced more than 10,000 exhibits to demonstrate that it was in each instance simply meeting the price being offered by some other manufacturer such as Safelite or Shatterproof. The

Defendant filed a Motion for Directed Verdict, which was based alternatively on the theory that the Plaintiff had failed to establish the essential elements of his cause of action, or alternatively, that the Defendant PPG had established as a matter of law the Section 2(b) defense of good faith meeting the competition. The motion was denied by the District Court, and a jury verdict was returned in favor of Hanson awarding actual damages of $148,000.00. This award was trebled by the District Court, and an additional $80,000.00 was awarded as attorneys' fees. PPG appealed, and the Court of Appeals for the Fifth Circuit reversed and rendered on the grounds that the Motion for Directed Verdict should have been granted for the Defendant.

REASONS FOR GRANTING WRIT

1. The decision of the Appeals Court is in conflict with the prior applicable decision by this Court in *Standard Oil v. F.T.C.*, as well as with the decision of the Second Circuit in *Standard Motor Products, Inc. v. F.T.C.*

2. The Court of Appeals, by its decision that competitive injury can be negated by the fact that the purchasers discriminated against had available comparable products from other suppliers or manufacturers at equivalently low prices, so as to constitute a complete defense to any action under the Act, has announced an important question of federal law which has not been, but should be, settled by this Court.

3. The decision of the Court of Appeals has departed from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision by reversing and rendering a judgment based

on a jury verdict on the basis that a directed verdict should have been granted because certain "cost justification" defenses were established as a matter of law, when such defenses were not raised by the evidence, nor asserted as a basis for the motion for directed verdict.

4. The decision of the Court of Appeals has departed from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision by concluding in its decision that the "good faith meeting competition" defense was established as a matter of law, where the evidence in the record, though not factually disputed, is subject to different inferences and interpretations.

5. The decision of the Appeals Court that the causation of Hanson's financial failure was factors other than price discrimination by the Defendant PPG is in direct contravention to this Court's pronouncement in the Story Parchment Co. case.

ARGUMENT

1. The decision of the Appeals Court is in conflict with the prior applicable decision by this Court in Standard Oil v. F.T.C., as well as with the decision of the Second Circuit in Standard Motor Products, Inc. v. F.T.C.

The thousands of documents introduced into the record in the courts below in this case clearly establish that while PPG met the lower prices offered by competitors when selling to Martex and every other independent glass dealer in the East Texas market, PPG steadfastly and without exception refused to give the Plaintiff Hanson the benefit

of such lower prices. It is likewise undisputed that PPG knew that neither Hanson nor any other dealer could remain in business if they had to pay a higher price for its merchandise over a long period of time. And finally, it is significant that all of the documentary evidence, as well as the testimony of the marketing manager for PPG in the area during the period in question, establish that PPG met its competitors' prices in sales to Martex and other independent glass dealers, not to *retain* them as customers, but to induce them to become new customers of PPG and thus expand the Defendant's share of the market.

In view of these facts, in order to find that the "good faith meeting competition" defense of Section 2(b) was established as a matter of law, the Appeals Court was required to conclude in its opinion that the "good faith meeting competition" defense is not limited to circumstances where a seller is attempting to retain its customers, but that "meeting competition" is also a reasonable competitive tactic and affords complete protection to sellers acting with predatory intent, that is, a design or purpose to eliminate competition and increase its share of the market. It is submitted that such a conclusion conflicts with prior decisions of this Court and that of the Second Circuit, and further is contrary to the public policy sought to be accomplished by the enactment of this statute.

In *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951), this Court had occasion to examine and interpret the "good faith meeting competition" defense, and describes the "actual core of the defense" as follows:

> "* * * That wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, *to retain that customer*, may in good faith meet that lower price." 340 U.S. at 242.

While some commentators have expressed the view that this language was dicta, the opinion of this Court goes on for several pages to discuss and characterize the Section 2(b) defense in terms of an effort to "retain a customer by realistically meeting in good faith the price offered to that customer", and undoubtedly this was the interpretation placed upon the statute by the Court at that time. Furthermore, the Court has never withdrawn, restricted or indicated any disagreement with this interpretation of the statute in the twenty-two years intervening since the *Standard Oil* opinion.[1]

In *Standard Motor Products v. F.T.C.*, 265 F.2d 674 (2nd Cir. 1959), the Second Circuit concluded that:

> " * * * It is well settled that a lowered price is within Section 2(b) only if it is made in response to an individual competitive demand * * * and *only if it is used defensively to hold customers rather than to gain new ones.*" 265 F.2d at 677. (emphasis supplied)

The Appeals Court opinion recognizes the dichotomy between its conclusion and prior interpretations of the Section 2(b) defense by this Court and other Circuits. The opinion below states:

> "Even though there may be some doubt whether the defense of meeting competition is available when used to gain new customers as opposed to retaining old ones, no such distinction is apparent in the

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[1] See also *F.T.C. v. Staley Manufacturing Co.*, 324 U.S. 746 (1945). In this case, it was stipulated that the defendant had merely adopted their competitor's price structure; but this Court nevertheless rejected the "good faith meeting competition" defense, because it found that Staley's purpose was not simply to meet the competitive situation, but was actually intended for another reason, i.e., to inflate prices in other areas.

> statute, and accordingly we follow the reasoning of the decision by the Seventh Circuit in *Sunshine Biscuits, Inc. v. F.T.C.*, 1952, 306 F.2d 48, and find that PPG engaged in reasonable competitive tactics." Opinion, pp. 13-14.

In a footnote, the opinion below recognizes that the contrary result was reached by the Second Circuit in the *Standard Motor Products, Inc.* case, but does not mention the prior opinion of this Court in *Standard Oil*. Nevertheless, it appears that even the opinion of the Court of Appeals below recognizes that its decision in this case is in conflict with the decision of another Court of Appeals on the same matter. We further submit that it is conflict with the prior opinion of this Court in *Standard Oil*, and respectfully urge that certiorari be granted in order that these conflicts may be resolved.

It is submitted that the only interpretation which conforms to the Congressional intent of the Robinson-Patman Act is that meeting the equally low prices of a competitor in good faith is protected by Section 2(b) if it is reasonably shown to be a defensive tactic in an effort to retain customers, but that it is not within the scope of protection if it is motivated by predatory intent. In the context of this case, to avail itself of the Section 2(b) defense, PPG should have been required to demonstrate that it gave lower prices to meet competition in sales to Martex and other dealers competing with Hanson, in order to retain them as customers or potential customers. But where, as here, the favored purchasers were never PPG customers before, and that the pricing policy was adopted in an effort to gain a larger share of the market, then PPG could not lawfully discriminate against other dealers in a market area, such as Hanson. If PPG was to cut prices to

gain new customers in the market area, it must also offer the same reduced prices to old customers as well, or it will unlawfully discriminate under the Robinson-Patman Act.

2. The Court of Appeals, by its decision that competitive injury can be negated by the fact that the purchasers discriminated against had available comparable products from other suppliers or manufacturers at equivalently low prices, so as to constitute a complete defense to any action under the Act, has announced an important question of federal law which has not been, but should be, settled by this Court.

On page 15 of the Appeals Court opinion, the Appeals Court recognizes that competitive injury may ordinarily be inferred when one set of customers buys at a substantially lower price than other customers. However, the Court goes on to announce the following principle:

> "In the present case, any inferred competitive injury is negated by the fact that Hanson had available comparable products from other suppliers at prices equivalent to the prices PPG gave to Hanson's competitors."

The pronouncement that such facts negate existence of competitive injury and thereby constitute a complete defense to an action under the Robinson-Patman Act is a concept heretofore unrecognized by this Court.[2] Such a result is suggested nowhere in the language of the Act, and it would be clearly contrary to the underlying purpose of the Act. If this law is to have any vitality whatsoever, the fact as to whether comparable products are available

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[2] This concept has apparently been rejected by the 7th Circuit. See *National Dairy Prod. v. F.T.C.*, 395 F.2d 517, at 523 (7th Cir. 1968).

cheaper from other manufacturers can not be considered by the Courts as affording a complete defense.[3]

Surely the Robinson-Patman Act is not so unreasonable as to permit a discriminating seller to defend by asserting that the plaintiff had an option of avoiding damages by changing his source of supply and dropping the merchandising scheme he has spent his money and time developing.[4] This argument is analagous to the "passing on" defense which has been rejected in Clayton Act cases. In those situations where the supplier was found guilty of charging unlawfully high prices, it was frequently argued that buyers could show no damage because they could have or in fact did pass the price increase on to their own customers, thus suffering no net loss per sale. This concept has been repeatedly rejected as being contradictory to the spirit and intent of the law. See *Hanover Shoe v. United Shoe Machines*, 392 U.S. 481, 489 (1968).

In substance, the rule pronounced by the Appeals Court is that whenever there is a comparable product in a given market available cheaper than a certain manufacturer's product, for instance, PPG's, then PPG may selectively and discriminatorily lower its prices to its dealers, and the

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[3] It is noteworthy that the chart on page 15 of the Appellate Court's opinion, which represents that the Plaintiff purchased only 26% to 1% of his supplies from PPG, is grossly inaccurate, and is an example of the poor job the Appellate Court did in attempting to redetermine the facts in this case. The Defendant's own exhibits D.A-2 and D.A.-3 and other invoices demonstrate that out of some $36,384.00 in purchases during 1964-65, Hanson purchased $34,215.00 worth of goods from PPG, instead of the $8,066.00 reported in the Court's chart. The Court was apparently lead into this error by copying from a chart appearing in one of PPG's briefs, which contained the identical erroneous figures.

[4] The F.T.C. and 7th Circuit rejected a similar argument in *National Dairy Products v. F.T.C.*, supra, fn. 2.

dealer so wronged would have no cause of action under the Robinson-Patman Act because he had an option (however onerous) to drop the PPG line and become a dealer for Safelite or Shatterproof or offer some other competing line of merchandise. This is clearly unreasonable and not in harmony with the spirit and purpose of the Act. A seller would have carte blanche authority to engage in price discrimination, with just a showing that a competing product was available cheaper.[5]

Surely those who drafted the Robinson-Patman Act would never have contemplated such a result; if the availability of other, cheaper products in the market is to become a complete defense to an action under the Robinson-Patman Act, on the theory that it negates any existence of any competitive injury, then certainly this important question of federal law should be considered and settled by this Court, and thus certiorari should be granted in this cause.

3. The decision of the Court of Appeals has departed from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision by reversing and rendering a judgment based on a jury verdict on the basis that a directed verdict should have been granted because certain "cost justification" defenses were established as a matter of law, when such defenses were not plead, not raised by the evidence, nor asserted as a basis for the motion for directed verdict.

The crux of the Appeals Court opinion is contained in this paragraph from page 8:

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[5] This view was rejected in *F.T.C. v. Staley*, 324 U.S. 746, fn at 754 (1945).

> "After reviewing this material we find that the *three defenses* justify all of the instances of price differentials except a few which are de minimis." (Emphasis supplied)

The Court then proceeds to discuss defenses pertaining to (a) price differentials due to "differing methods of manufacture"; (b) price differentials due to "differing quantities purchased"; and (c) price differentials "to meet competition".

The first two bases relied upon in the Court's opinion to require a reversal of the jury verdict relate to the so-called "cost justification" defenses of Section 2(a) of the Act. How the Appeals Court could have been misled into believing that such defenses were available as a basis for reversing and finding that the Motion for Directed Verdict should have been granted is a complete mystery. The cost justification defenses were not raised in either the Motion for Directed Verdict or Motion for Judgment Non Obstante Veredicto. The Defendant clearly did not believe that the cost justification defenses were available at the trial, because it did not either request charges on these defenses or object to the fact that the Trial Court's charge did not instruct the jury as to the existence of cost justification defenses.

It should have thus been clearly evident that PPG could not avail itself of these defenses at the appellate stage of the proceedings. The Appeals Court properly had under review only the issue of whether the Defendant's Motion for Directed Verdict was properly denied by the District Court. This motion is set out in full in the Appendix and clearly makes no reference to the cost justification defenses or any assertion that such defenses are applicable

in the facts in this case. Since the Appellate Court can properly review only the question of whether the Defendant's Motion for Directed Verdict was properly denied by the District Court, and this motion did not raise or assert defenses under Section 2(a), it is submitted that the opinion below is seriously in error in concluding that the "differing methods of manufacture" and "differing quantities" justify, as a matter of law, many of the instances of price discrimination proven by Hanson.

Furthermore, the facts in the records simply do not support the lower Court's conclusion that either of the cost justification defenses were satisfied as a matter of law. In spite of the fact that the burden is on the Defendant to prove the elements of this defense, there is absolutely no semblance of evidence in the record to show the variation in manufacturing costs for specially cutting glass, or that the discount afforded to Hanson's competitors were in any way related to the volume purchased. Without the proper evidenciary foundation, the price differentials in this case simply can not be justified on the basis of either volume purchases or differences in manufacturing costs. Thus, the lower Court's opinion that the discounts given Hanson's competitors "appeared to reflect only the differences in the cost of manufacturing, selling and delivering items in larger volume" is totally unfounded, and justifies this Court, in the exercise of its power of supervision, to grant certiorari in this case.

4. The decision of the Court of Appeals has departed from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision by concluding in its decision that the "good faith meeting competition" defense was established as a matter of law, where the evidence in the record, though

not factually disputed, is subject to different inferences and interpretations.

Ordinarily, the question of "good faith meeting of the competition" is a question of fact to be determined by the jury. The burden of proof is on the Defendant seller to establish such defense by a preponderance of the evidence. *Corn Products v. F.T.C.*, 324 U.S. 726 (1945). Under appropriate instructions from the District Court in this case, the jury considered this defense and rejected it.[6]

However, on appeal, the Court of Appeals declared that this defense was established as a matter of law, and therefore the District Court erred in failing to grant an instructed verdict on behalf of PPG. In so finding the opinion below states:

> "We believe that a 'reasonable and prudent' man would conclude that PPG adopted Safelite's price list as a reasonable method of meeting the lower price of its competitor, thereby satisfying the test enunciated in Calloway Mills Co. v. F.T.C., Fifth Circuit, 1966, 362 F.2d 435, 442." Opinion, p. 12

Of course, it is apparent from this quotation that the Appellate Court has merely substituted its opinion for that of the District Court and jury, and has failed to apply the appropriate standard.[7] In short, in order to prevail on this question under the appropriate standard, the Defendant on

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[6] In this connection, it should be noted that the Court gave verbatim the requested instruction of the Defendant as to the defense of good faith meeting of the competition (App. 843-845; 886-887).

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[7] *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

appeal had the burden of establishing that the facts in the record so strongly and overwhelmingly favor its position that the Appellate Court must conclude that the District Judge and the jury could not as "reasonable men" arrive at a contrary verdict.

The obvious mistake of the Appeals Court opinion in passing on this question is that it focuses only on the evidence introduced by PPG. The Court's opinion assumes an ostrich-like posture, choosing to ignore the requirements of *Boeing* that all of the evidence in the record must be considered in determining the validity of the District Court's ruling.

The Appeals Court opinion also ignores the fact that mere proof that PPG lowered its price when a competitor lowered its price is not sufficient to sustain this defense. The keystone of this defense is "good faith". Whether the discriminatory pricing involved will be permitted depends basically upon the *intention* of the seller in cutting its prices.[8] Of course, as stated previously, any indication of predatory intent, or "offensive" as opposed to "defensive" pricing tactics (in attempt to obtain new customers instead of retaining old customers) destroys the element of good faith and along with it the defense of Section 2(b).[9]

The evidence supported the jury's finding that PPG was not acting in good faith on at least two scores. First of all, it was uncontradicted that some of those receiving

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[8] See *F.T.C. v. Staley*, supra, fn. 1. Adopting competitor's price structure can be unlawful, if intent or purpose is imporper.

[9] See Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 248 (1962 and 1964 Supplement); and discussion in Point 1., supra.

discriminatory prices from PPG were former customers of Hanson. PPG began calling on Hanson's customers and selling to them directly at a price lower than they sold to Hanson, with full knowledge that Hanson could not continue to compete under these circumstances. This, of course, was going on at the same time PPG was giving discriminatory lower prices to other glass shops in competition with Hanson. These facts clearly permit an inference that the intent of PPG's pricing activities was predatory, and the undisputed net result is that Hanson's major customers are now buying direct from PPG.

Secondly, there is the testimony of the Defendant's own sales representative, who was furnished by PPG as the person representing the Defendant in charge of the knowledge of the facts with reference to pricing of glass products in the pertinent market. He testified that if there was any difference in the pricing to different dealers in the area, there should not have been, and it could not have been because of any "competitive reasons".

Finally, if it had truly been the intent and purpose of PPG to lower its prices in a good faith effort to meet the prices offered by their competitors in the market, would it not have only been logical for them to "meet the competition" with lower prices to Hanson as well as to all of the other dealers? The more plausible and logical inference is that PPG wanted Hanson to be unable to compete, so that eventually the Defendant could take his territory over for more profitable, direct sales by the Defendant to his customers and to other dealers in the area.

Thus, the Appellate Court has committed a serious error in failing to indulge these inferences and consider this

evidence favorable to the jury verdict. Furthermore, the Appeals Court decision allows the second 2(b) defense to be established as a matter of law by simply showing that other competitors were offering equally low prices in the market area, without any reference to the purpose or intent of the Defendant in establishing its pricing policies. In this respect, the Appeals Court decision is in direct contravention of the prior opinions of this Court in *F.T.C. v. Staley Manufacturing Co.*, 324 U.S. 746 (1945), and *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951).

It is respectfully submitted that these grounds justify this Court granting certiorari in this case.

5. The decision of the Appeals Court that the causation of Hanson's financial failure was factors other than price discrimination by the Defendant PPG is in direct contravention to this Court's pronouncement in the Story Parchment Co. case.

The Appeals Court concludes its decision with an apparent factual finding that the actual causes of Hanson's business failure were competition from Martex, a fire loss with inadequate insurance coverage, and Safelite's refusal to deal with him after 1965. All of these factors were introduced before the jury and argued by PPG's counsel vigorously. Apparently the jury, which was in the position to observe the demeanor of the witnesses and visually follow references made to charts and exhibits offered as evidence, exercised its discretion to reject at least in part some of these arguments by PPG and awarded the Plaintiff a portion of the damages sought. The Appeals Court, without even any attempt to disguise its action, has simply substituted its opinion for that of the jury.

In *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931), almost identical circumstances were presented to this Court. In that case, the Circuit Court had found that the plaintiff's business failure was inevitable either from lack of capital or inefficient management or both. This Court reversed the Circuit Court's finding to this effect, and stated as follows:

> "* * * This conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. Whether the unlawful acts of the respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it'. * * * And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." 282 U.S. at 566.

The decision of the Appeals Court in this case is in direct contravention to the above pronouncement of this Court in *Story Parchment*, and it is respectfully submitted that this justifies this Court granting certiorari to review the decision of the Court of Appeals in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-2136

AUBREY D. HANSON d/b/a
HANSON PAINT & GLASS COMPANY,
Plaintiff-Appellee,

versus

PITTSBURGH PLATE GLASS INDUSTRIES, INC.,
Formerly Pittsburgh Plate Glass Company,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

(June 25, 1973)

Before GOLDBERG, AINSWORTH and INGRAHAM, Circuit Judges.

AINSWORTH, Circuit Judge: In this Robinson-Patman price discrimination action, defendant Pittsburgh Plate Glass Company[1] appeals from a judgment in favor of plaintiff Aubrey D. Hanson. We hold that the district court erred in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict, and reverse.

Hanson entered the glass industry at the age of 22 when he worked for PPG as a glass cutter in Shreveport, Louisiana, in 1927. Three years later he became a PPG saleman in Northerwestern Louisiana, Eastern Texas, Southeastern Oklahoma, and Southwestern Arkansas. In 1946, he established an independent glass retail business in Marshall, Texas. The business made an average profit of $12,892 for the years 1948 to 1955, but then sustained losses in each succeeding year except for small profits of $613 in 1958 and $204 in 1964.

Hanson's financial problems began when a new glass retailer, Martex Glass Company, opened in 1952 as a direct competitor in Marshall.[2] Martex became a recognized distributor of Shatterproof Glass Corporation, entitling it

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[1] Since suit was filed, the name of the company has been changed to P.P.G. Industries, Incorporated.

[2] Another problem was a fire in 1963 which destroyed part of the building Hanson rented. He did not have adequate insurance to cover his loss.

to greater discounts than were generally available to Hanson. For example, Shatterproof offered its auto glass to Martex at a discount of about 68 per cent. PPG offered auto glass to Hanson at a discount of about 55 per cent. Another glass distributor, Safelite Glass Corporation, undersold PPG by offering auto glass to all retailers at a discount of about 60 per cent. When Hanson's business began to decrease, PPG reassessed the situation in an effort to rebuild its volume of sales. PPG decided to approach Martex and offer it the lowest PPG published price, namely, the discount currently available in Marshall only to Hanson. But Martex declined and explained that the glass could be purchased at a lower price from other sources. As a result, on May 4, 1964, the PPG district manager in Shreveport authorized its salesman to "meet the prices being quoted by Safelite Glass Corporation of Dallas, Texas, to Martex Glass Company of Marshall, Texas." However, PPG continued to follow its own published list in selling to Hanson. Hanson continued to buy from PPG but purchased most of his inventory from Safelite and other suppliers.

Hanson's debts with various creditors increased as his business declined. He was indebted to the bank, did not pay his rent for five or six months, and post-dated his checks. After Hanson fell behind on his account for an amount in excess of $1,000, Safelite discontinued its business with him in 1965. By 1968, Hanson also owed substantial sums to his other suppliers, PPG and Binswanger Glass Company.

Hanson closed his business and then filed suit against PPG on April 10, 1968, alleging that defendant treated Hanson's competitors more favorably than it treated

Hanson, thus violating section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13 (1971). Plaintiff alleged that his "flourishing and profitable business" was destroyed and that he lost past and future profits estimated at $220,000. Plaintiff sought treble damages and reasonable attorneys' fees as provided by section 4 of the Clayton Act, 15 U.S.C. §15 (1971). Defendant counterclaimed on Hanson's overdue note dated February 3, 1965, payable to PPG for $23,983.59 plus interest and attorneys' fees. The district court granted summary judgment on PPG's counterclaim for $29,111.45, together with $7,277.86 as attorneys' fees.

Plaintiff's claim was tried before a jury. After a trial that lasted several days, with testimony of numerous witnesses and receipt in evidence of over 10,000 exhibits, defendant moved for a directed verdict under Rule 50(a), Federal Rules of Civil Procedure. The district judge denied the motion, and the jury returned a verdict in favor of Hanson for $148,000. PPG filed a motion for judgment notwithstanding the verdict under Rule 50(b), which was also denied. The district judge trebled the verdict of $148,000 to a total of $444,000, and added an allowance of $80,000 for attorneys' fees. Only PPG appeals so the propriety of the summary judgment against Hanson on the counterclaim is not contested.

Plaintiff grounds his action under the provisions of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which forbids "any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, to prevent competition

with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. §13(a) (1971). *There are three possible defenses available to defendant PPG* under the circumstances of this case. *First, section 2(a)*[3] *expressly permits justification for price differentials due to "differing methods" of manufacture. Second, section 2(a)*[4] *permits another cost justification*[5] *when "differing . . . quantities" are purchased. Third, section 2(b)*[6] *provides a defense if the seller lowered its price "in good faith to meet an equally low price of a competitor."*

In assessing whether the defendant carried its burden of defending its price differentials, *see Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44-45, 68 S.Ct.

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[3] The defense is based on the following language in 15 U.S.C. § 13(a) (1971): . . . *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods . . . in which such commodities are to such purchasers sold or delivered . . . .

[4] The defense is based on the following language in 15 U.S.C. §13(a) (1971): . . . *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing . . . quantities in which such commodities are to such purchasers sold or delivered.

[5] "Cost justification" is a term of art frequently employed by commentators to denote section 2(a) defenses for price differentials which reflect differences in the cost of supplying different purchasers. *See, e.g.*, P. Areeda, Antitrust Analysis 684 (1967); D. Baum, The Robinson-Patman Act 22 (1964); A. Stickells, Antitrust Laws 477-78 (1972).

[6] The defense is based on the following language in 15 U.S.C. §13(b) (1971): . . . *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

822, 827 (1948), to such an extent as to warrant a directed verdict, we are guided by the standard of review enunciated in *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365, 374 (*en banc*):

> On motions for directed verdict and for judgment notwithstanding the verdict (*the Court should consider* all of the evidence–not just that evidence which supports the non-mover's case–*but in the light and with all reasonable inferences most favorable to the party opposed to the motion.*) If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, *it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence* and inferences, and determine the credibility of witnesses.

We find that there is no conflict in substantial evidence and, accordingly, we are compelled to reverse.

Aside from a full transcript of the trial, together with all the exhibits, we have the benefit of a well-organized

presentation of the facts submitted in the briefs of both parties which was not available to the jury or district court. Thus we have given unusually close and careful attention to the record herein.

During the trial plaintiff introduced numerous exhibits in an effort to show that the prices charged by PPG to Hanson were higher than those charged by PPG to competitors of Hanson. Plaintiff's counsel showed his exhibits to the jury on a projector, thereby saving the time of handing each exhibit from juror to juror. Plaintiff's counsel then interrupted the review of exhibits with a series of questions to Hanson about the history of Hanson's dealings with his customers. The defense responded with its own testimony, price lists, and invoices of sales by PPG's competitors. *After studying the record we believe it was highly unlikely that the jury or district judge could have fully assimilated the material as presented.* During oral argument of this case on appeal, we requested that counsel for plaintiff make a list in a supplemental brief of *each transaction* supporting his allegations of price discrimination. Counsel for defendant then agreed to review each transaction and justify any price differences between PPG's invoices to Hanson and to his competitors in a reply brief.

Plaintiff's counsel prepared a "Chart of Comparable Sales"[7] to show in PPG's sales to Hanson the invoice

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[7] This "Chart of Comparable Sales" was essentially the same as Exhibit A in plaintiff's original appellate brief. At oral argument, after counsel for plaintiff called Exhibit A the "critical exhibit as far as plaintiff is concerned," this Court asked, "Do you stand or fall on whether the proof in Exhibit A stands or falls?" Counsel answered, "I will come close to saying, yes sir." Then he went on to say that the exhibit represents the "bulwark" of purchases in years 1964 and 1965 by Hanson from PPG.

number, date, item, and percentage of discount, which was then compared to discounts PPG gave to Hanson's competitors. *Defendant responded to each instance of alleged price discrimination by producing folders of invoices categorically arranged by type of item sold.* In addition, defendant supplied summaries by date of the price lists used by PPG and its competitors, such as Safelite, Autoglass Company, and Carlite.

After reviewing this material we find that the three defenses justify all of the instances of price differentials except a few which are *de minimis.*[8]

We illustrate how each defense applies to certain transactions as follows: As to the first defense pertaining to price differentials due to *"differering methods" of manufacture*, the documentation shows that sales listed by Hanson in support of his contention of price differentials actually involved items where there was justification for the difference based on higher cost of manufacture. Hanson thus lists a purchase from PPG dated April 15, 1964, of 1/8-inch Factrolite at a price of 62 cents per foot and Geldmeier's purchase from PPG at 35 cents per foot. But reference to the invoices shows that (*Hanson purchased specially cut* size whereas Geldmeier purchased a *standard stock* size.) Both sales by PPG to Hanson and to Geldmeier followed PPG's published price. *The different*

[8] Several sales by PPG to Binswanger Glass Company of Shreveport, Louisiana, are in the *de minimis* category. Binswanger was a competitor of PPG, so PPG had no interest in making sales in large quantities at low prices to Binswanger, thereby minimizing any potential harm to Hanson or to the public. The quantity of such sales was small, apparently only occurring as a courtesy which one distributor extended to the other when one had need of an item not in stock. These *de minimis* sales do not violate section 2(a), since the section applies only where "the effect of such discrimination may be *substantially* to lessen competition." (Emphasis added.) *See* Skinner v. United States Steel Corp., 5 Cir., 1956, 233 F. 2d 762, 764.

price reflects the added cost of specially cutting the items and is therefore justified under section 2(a). See Sylvania Elec. Prod., Inc., 51 F.T.C. 282 (1954), *reprinted in* 2 S. Oppenheim & G. Weston, The Lawyers' Robinson Patman Act Sourcebook 921 (1971). *See generally* P. Areeda, Antitrust Analysis 685 (1967); E. Kintner, An Antitrust Primer 68-70 (1964); F. Rowe, Price Discrimination Under the Robinson-Patman Act 281-82 (1962).

As to the second defense which related to cost justification when *differing quantities* are purchased, Hanson compared PPG sales without indicating that Hanson bought less on these occasions than his competitor purchased from PPG. Volume discounts are typical for this industry.[9] Any lower price given to Hanson's competitor followed a price list granting volume discounts. As an illustration, Hanson's chart compared his purchase of a 1/4-inch thick mirror on June 18, 1965, with Magnolia's purchase on January 20, 1965, demonstrating that PPG charged Hanson $1.10 per square foot and Magnolia $1 per square foot. Yet the chart failed to compare the volume involved in each purchase. Hanson purchased one mirror of about 41 square feet whereas Magnolia purchased eleven mirrors totaling 429 square feet. PPG's published price list shows a charge of $1.10 per square foot for a purchase of less than 400 square feet, a charge of $1 per square foot for a purchase of more than 400 square feet, and a charge of 95c per square foot for a purchase of 850 square feet. What PPG charged Hanson and Magnolia conforms exactly to the *price list*. Magnolia got a lower price by purchasing a sufficient quantity to be eligible for a 10c per square foot savings. *We recognize the difficulty of justifying quantity*

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[9] The importance of this factor is reflected in our recent opinion in Hampton v. Graff Vending Co., ____ F.2d ____ [No. 72-3276, May 9, 1973, p. 15].

discounts. See United States v. Borden Co., 370 U.S. 460, 82 S.Ct. 1309 (1962); *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U.S. 61, 68, 73 S.Ct. 1017, 1021-1022 (1953). *See generally* P. Areeda, Antitrust Analysis 686 (1967); F. Rowe, Price Discrimination, ch. 10 (1962); Lovett, *A Crossroads for the Robinson-Patman Act*, 45 Tul. L. Rev. 1, 11-14 (1970). But this case differs in principle from the leading case of *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 42, 68 S.Ct. 822, 826 (1948), where the quantity discounts were "equally available to all, but functionally they are not." PPG's price schedules did not require a purchase of such large quantities as to make the discounts functionally unavailable to Hanson. The discounts were graduated with such small increments that they appear to reflect only the differences in the cost of manufacturing, selling, and delivering items in larger volume.

As to the third defense relating to *price differentials to meet competition*, in the instances where PPG gave some customers a price differing from the price available to Hanson, PPG met the price offered to the customers by competitors of PPG. Thus PPG followed its own published price list in sales of windshields to Hanson but followed Safelite's published price list in sales of windshields to Martex.[10]

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[10] Using the example of automobile glass earlier referred to, we note that PPG's published price list gave discounts of the following amounts depending on the quantity of windshields purchased:

52.60% discount for 1 part
55.00% discount for 2 parts
56.80% discount for 3 parts
58.00% discount for 4 to 11 parts
59.80% discount for 12 to 33 parts
61.00% discount for 24 or over parts

Safelite, however, offered the following published discounts on windshields, which were greater and resulted in lower prices:

The meeting of competition defense provided in section 2(b) has been interpreted to be an absolute defense, *Standard Oil Co. v. Federal Trade Comm'n*, 340 U.S. 231, 71 S.Ct. 240 (1951); *Jones v. Borden Co.*, 5 Cir., 1970, 430 F.2d 568, 572, and applies despite the incidence of damage to nonfavored purchasers. *Federal Trade Comm'n v. Sun Oil Co.*, 371 U.S. 505, 519-20, 83 S.Ct. 358, 367 (1963); *see* C. Austin, Price Discrimination 97 (1959). [*We believe that a "reasonable* and prudent" man would conclude that PPG adopted Safelite's price list as a reasonable method of meeting the lower price of its competitor,] thereby satisfying the test enunciated in *Callaway Mills Co. v. Federal Trade Comm'n*, 5 Cir., 1966,

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60% discount for 1 to 2 parts
61% discount for 3 to 5 parts
62% discount for 6 to 23 parts
63% discount for 24 or more parts

To further illustrate what the proof showed, and applying the above discounts, we have examined a number of PPG sales of windshields listed in plaintiff's brief and have added a column indicating the volume purchased, as follows:

Hanson Invoice (PPG)	*Date*	*Volume*	*Discount*
01659	4/13/64	1	52.60%
01534	4/16/64	2	55.00%
01579	4/16/64	1	52.60%
02079	4/22/64	1	52.60%
04010	5/28/64	1	55.00%
04365	6/ 4/64	2	55.00%
06135	7/ 6/64	1	52.60%
07625	7/31/64	1	52.60%

Martex Invoice (PPG)	*Date*	*Volume*	*Discount*
04505	6/ 8/64	11	62.00%
05856	6/30/64	6	62.00%
07527	7/29/64	2	60.00%

It is thus clear that PPG's charges to Hanson followed the PPG published price list (shown above), and its charges to Martex met Safelite's published price list (shown above). The only exception is an invoice to Hanson, number 04010, where PPG gave Hanson a greater discount than was warranted by the volume purchased.

362 F.2d 435, 442. *See also Jones v. Borden Co.*, 5 Cir., 1970, 430 F.2d 568, 572; *Surprise Brassiere Co. v. Federal Trade Comm'n*, 5 Cir., 1969, 406 F.2d 711, 715.

Hanson's counsel argued to the jury, however, that PPG did not verify its competitors' offers until after the lawsuit was filed.[11] We note in the record, however, several letters between PPG's salesman and district manager discussing the need to meet competition from Safelite. There is also other evidence to confirm that PPG acted in good faith to meet competition. Safelite made its prices available to many retailers in the area, so its prices were not secret.[12] A representative of Hanson's competitor, Ray Lawson of Martex, testified that the lower prices they received from PPG came after a discussion of prices being offered by PPG's competitors.

Hanson contends that it was indicative of PPG's "predatory intent" that PPG called on Hanson's customers and offered them greater discounts than were given to Hanson. But these discounts conform to the competitive prices offered by PPG's competition. Furthermore, the customers Hanson mentioned were volume purchasers, such as automobile dealers, who reasonably might be expected to deal directly with a manufacturer. When

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[11] In a case denying the defense due to inadequate efforts to verify the competitor's prices, the Supreme Court concluded that "the statute at least requires the seller, who knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." Federal Trade Comm'n v. A. E. Staley Mfg. Co., 324 U.S. 746, 759-60, 65 S.Ct. 971, 977 (1945).

[12] Hanson himself on October 1, 1964, ordered six windshields from Safelite, of which five were delivered and one backordered, at Safelite's discount of 62 per cent.

Hanson resigned from PPG in 1946 to establish an independent business, he did not retain an exclusive right to deal with customers in the area of Eastern Texas. He had been the PPG salesman in the area prior to 1946, and, after he left, PPG replaced him with another salesman. *Even though there may be some doubt whether the defense of meeting competition is available when used to gain new customers as opposed to retaining old ones, no such distinction* is apparent in the statute, and accordingly we follow the reasoning of the decision by the Seventh Circuit in *Sunshine Biscuits, Inc. v. F.T.C.*, 1952, 306 F.2d 48,[13] and find that PPG engaged in reasonable competitive *tactics. See generally Hampton v. Graff Vending Co.*, 5 Cir., 1973, 478 F.2d 527 [No. 72-3276, May 9, 1973, p. 15].

Our review of the case convinces us that there is *no conflict in substantial evidence*, and that a verdict should have been directed for defendant. PPG does not dispute plaintiff's evidence, but relies on the defenses provided for by the Clayton Act itself (as amended). *The differences in prices charged by PPG are in each instance fully supported by one of these defenses and by evidence in which there is no substantial conflict.*

Finally, the evidence does not support Hanson's argument that he went out of business due to PPG's pricing policies during the relevant period[14] from 1964 to 1968.

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[13] *Accord*, National Dairy Prod. Corp. v. Federal Trade Comm'n, 7 Cir., 1968, 395 F.2d 517, 524 n. 3, *contra*, Standard Motor Prod., Inc., v. Federal Trade Comm'n, 2 Cir., 1959, 265 F.2d 674, 677. *See generally* 4 J. von Kalinowski, Antitrust Laws and Trade Regulation, p. 32-73 (1970): "The better rule is that of the Seventh Circuit."

[14] According to 15 U.S.C. §15(b) (1971), "Any action to enforce any cause of action . . . of this title shall be forever barred unless commenced within four years after the cause of action accrued." *See generally* A. Stickells, Antitrust Laws 644 (1972).

Hanson's purchases from PPG during the four-year period never exceeded 26 per cent of his total purchases in any single calendar year and were as low as 1 per cent in one year. These purchases are summarized as follows:

Year	*Hanson's Purchases From All Suppliers*	*Hanson's Purchases From PPG*	*Hanson's Purchases From PPG As Percentage of Hanson's Purchases From All Suppliers*
1968	$ 6,777	$ 442	6%
1967	5,227	39	1%
1966	7,626	192	2%
1965	18,795	3,493	18%
1964	17,589	4,573	26%
(Apr.-Dec.)		$8,066	

Nevertheless, competitive injury may be inferred when one set of customers buys at substantially lower prices than other customers. *Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 47, 68 S.Ct. 822, 828-29 (1948). In the present case, any inferred competitive injury is negated by the fact that Hanson had available *comparable products from other suppliers at prices equivalent to the prices PPG gave to Hanson's competitors. See* Admiral Corp., FTC Dkt., CCH Trade Reg. Rep. ¶17,230, p. 22,304 at p. 22,309 (1965), *reprinted in* S. Oppenheim & G. Weston, The Lawyer's Robinson-Patman Act Sourcebook 256, 262 (1971). *See also Borden Co. v. F.T.C.*, 5 Cir., 1967, 381 F.2d 175, 180.

A review of Hanson's profits for the period 1948 through 1968[15] belies the conclusion that PPG drove him out of business by its pricing policies during the statutory period from 1964 to 1968. During most of the last thirteen years he consistently operated at a loss. It had been eight years prior to the start of the statutory period since Hanson made a substantial profit. His business, therefore, was not, as he contends, "flourishing and profitable" at the time PPG began giving his nearest competitor, Martex, the greater discounts.

The actual causes of Hanson's failure appear to be the new competition after 1952, the fire that partially destroyed the building in 1963 when he had inadequate insurance to cover his loss, and Safelite's refusal to deal with him after 1965 when he did not pay his debt. None of these causes can be attributed to the actions of PPG.

REVERSED.

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[15] The 1948-1968 profits are as follows:

Year	*Hanson's Profit*
1968	(undetermined loss)
1967	(undetermined loss)
1966	($4,930)
1965	($ 132)
1964	$ 204
1963	($13,759)
1962	($2,128)
1961	($15,452)
1960	($6,437)
1959	N. A.
1958	$ 613
1957	($8,080)
1956	($2,874)
1955	$5,437
1954	$6,299
1953	$13,259
1952	$11,246
1951	$6,568
1950	$25,095
1949	$21,047
1948	$14,185

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

AUBREY D. HANSON d/b/a
HANSON PAINT & GLASS COMPANY

VS. CIVIL ACTION NO. 1285

PITTSBURGH PLATE GLASS
COMPANY

MOTION FOR INSTRUCTED VERDICT

TO THE HONORABLE THE UNITED STATES DISTRICT COURT:

NOW COMES P.P.G. Industries, Inc., formerly Pittsburgh Plate Glass Company, defendant in the above entitled and numbered cause, and at the close of all the evidence, pursuant to Rule 50 of the Federal Rules of Civil Procedure, respectfully moves this Honorable Court to direct the jury to return a verdict in favor of the defendant and against the plaintiff for the following reasons:

1.

There is no evidence in this record to raise a fact issue that there were contemporaneous sales of commodities of like grade and quality in interstate commerce to the plaintiff and to a competitor of the plaintiff at discriminatory prices.

2.

There is no evidence to raise a fact issue for the jury that there was injury to competition or substantial effect on interstate commerce and competition.

3.

There is no evidence in this record to raise a fact issue for the jury that the sales involved herein, both to plaintiff and to plaintiff's competitors were in interstate commerce, or, alternatively, that one of such sales at the times involved was in interstate commerce.

4.

There is no evidence to raise an issue of fact for the jury that there were any discriminatory sales to the plaintiff and to plaintiff's competitors within the relevant product market at discriminatory prices.

5.

The undisputed evidence showing that the sales of products to competitors of the plaintiff by the defendant were made at prices in a good-faith effort to meet competitive prices of defendant's competitors, there is no evidence to raise an issue of fact for the jury to determine.

6.

The evidence showing that any sales of products within the relevant product market by the defendant to the plaintiff in interstate commerce was so insignificant that the same could not have any substantial effect upon

commerce or upon competition, there is no issue of fact for the jury to determine.

7.

The undisputed evidence showing that the plaintiff had available for purchase, and actually did purchase products within the relevant product market from competitors of the defendant at prices which were as low as, or lower than the defendant sold to plaintiff's competitors, there is no issue of fact for the jury.

8.

The undisputed evidence showing that any difference in the price charged to plaintiff by the defendant and to any of plaintiff's competitors by the defendant was so small as to be so insignificant that the same could not have substantial effect on interstate commerce and could not have caused injury to plaintiff, there is no issue of fact in this case.

9.

The undisputed evidence showing that the defendant only lowered its price to customers in order to meet competition and since it was not compelled to lower its prices to all customers or to any particular customer, the evidence is insufficient to raise a fact issue for the jury that the defendant violated the applicable anti-trust act.

10.

The defendant being under no obligation to sell its products to any person, firm or corporation, and being

under no obligation to offer or attempt to sell its products to any person, firm or corporation, the evidence does not raise any fact issue for the jury that defendant, in any way or manner, violated the Clayton Act, as amended by the Robinson-Patman Act, in failing to call on the plaintiff, furnish price lists to the plaintiff, or in any other way solicit his business.

11.

Credit not being a service within the provisions of the Robinson-Patman Act, the failure to extend additional credit to the plaintiff, or to refuse credit to the plaintiff, cannot form the basis of any action against the defendant.

12.

There is no issue of fact for the jury in reference to glazing jobs because glazing jobs are not within the provisions of the Clayton Act, as amended by the Robinson-Patman Act, in that glazing jobs are unique and do not involve goods of like grade and quality with other glazing jobs, in that there is a difference between each and every glazing job.

13.

The evidence does not raise a fact issue for the jury that any damages sustained by the plaintiff were proximately caused by any violation by the defendant of the Clayton Act, as amended by the Robinson-Patman Act.

14.

The undisputed evidence shows that any cause of action of the plaintiff is barred by the statute of limitation.

15.

There is no legal evidence to raise an issue for the jury that plaintiff has been damaged in his business or property by any conduct of the defendant in violation of the applicable Anti-Trust Acts.

16.

The evidence in this record as to the alleged damages of the plaintiff is so vague, uncertain and inadequate that it is legally insufficient to raise an issue of fact for the jury.

17.

This Honorable Court should not entertain jurisdiction of this case and should instruct the jury to return a verdict in favor of the defendant and against the plaintiff because there is no evidence that shows that there were contemporaneous sales of commodities of like grade, quality and quantity in interstate commerce to the plaintiff and a competitor of the plaintiff at discriminatory prices, and there is no evidence to show injury to competition or substantial effect on interstate commerce and competition

WHEREFORE, PREMISES CONSIDERED, this defendant prays this Honorable Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff.

Respectfully submitted,

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BY_____
ATTORNEYS FOR DEFENDANT

A copy of the above motion has been served on plaintiff herein by delivering same to its attorneys of record, Messrs. Jones, Jones & Baldwin, P. O. Drawer 1249, Marshall, Texas, on this the 22 day of November, 1971.

_____
OF COUNSEL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-769

AUBREY D. HANSON d/b/a
HANSON PAINT & GLASS COMPANY
Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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15 U.S.C. §13	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-769

AUBREY D. HANSON d/b/a
HANSON PAINT & GLASS COMPANY
Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now Comes the Respondent, Pittsburgh Plate Glass Company, and respectfully requests that the Petition for Certiorari be denied for the following reasons.

1. Nature of the Case and Proceedings Below

On April 10, 1968 the Plaintiff-Petitioner, Aubrey D. Hanson d/b/a Hanson Paint & Glass Company (hereinafter referred to as Hanson) filed a complaint against Defendant-Respondent, Pittsburgh Plate Glass Company[1] (hereinafter referred to as PPG) alleging a secondary-line price discrimination action under the Clayton Act, as amended, 15 U.S.C. 13.

1. The Company's name was changed to PPG Industries, Inc. on April 1, 1968.

PPG asserted a counterclaim against Hanson to recover on a promissory note of $23,983 which Hanson had executed on February 3, 1965 to cover the cost of goods which PPG had sold to Hanson over the years and for which Hanson had not paid PPG.

The case came on for trial on November 17, 1971 in the U.S. District Court for the Eastern District of Texas, Marshall Division.

The trial court entered a Summary Judgment in favor of PPG on the promissory note for the total sum of $36,388, which included interest and attorneys' fees. Hanson did not appeal that Summary Judgment.

The jury returned a verdict in favor of Hanson for $148,000. The trial court trebled that verdict to $444,000 and then awarded Hanson the additional sum of $80,000 for attorneys' fees, bringing the total judgment against PPG to $524,000.

The trial court denied PPG's motions for a dismissal, for a directed verdict and for judgment notwithstanding the verdict. Accordingly, PPG appealed to the U.S. Court of Appeals for the Fifth Circuit and that Court reversed and rendered judgment in favor of PPG. (See 482 F.2d 220).

Hanson has now filed a Petition for a Writ of Certiorari to this Court.

2. Statement of the Facts

PPG manufactures and sells various types of glass, metal and paint products. For many years PPG sold its products through its Branch store located in Shreveport, Louisiana. That Branch serviced the northern portion of Louisiana and portions of southeastern Okla-

homa, southwestern Arkansas and eastern Texas, including Harrison County, in which the City of Marshall, Texas is located.

From 1927 to 1946 Hanson was employed by PPG at its Shreveport Branch and during most of that period he solicited customers in the aforesaid territory and sold PPG products to those customers. In 1946, Hanson left PPG and opened his own store in Marshall, Texas. When Hanson left PPG, PPG replaced Hanson with another PPG salesman who continued to solicit customers on behalf of PPG in the same territory that Hanson had previously covered.

Hanson was in business from 1946 until he went out of business in 1968. During that period Hanson's net profits (or losses) were as follows:

Year	Hanson's Profit or (Loss)
1968	(undetermined loss)
1967	(undetermined loss)
1966	($ 4,930)
1965	($ 132)
1964	$ 204
1963	($13,759) *
1962	($ 2,128)
1961	($15,452)
1960	($ 6,437)
1959	N.A.
1958	$ 613
1957	($ 8,080)
1956	($ 2,874)
1955	$ 5,437
1954	$ 6,299
1953	$13,259
1952	$11,246
1951	$ 6,568
1950	$25,095
1949	$21,047
1948	$14,185

*includes fire insurance recovery of $21,056.

The above table clearly shows that Hanson's business was unprofitable from 1956 through 1968. Although the table seems to indicate that Hanson's business was profitable during the 1948-1955 period when his annual net profits averaged $12,892, in fact, his business was not profitable even then. This is true because during those same years Hanson was constantly depleting his assets; indeed, his yearly withdrawals during the 1948-1955 period averaged $14,039, or $1,147 per year more than his average profits.

Hanson was constantly undercapitalized through the entire period that he was in business. He dropped behind in his rent payments for extended periods of time and he was forced to execute or renew over 90 promissory notes to various banks in the area. In addition, PPG supplied substantial quantities of products to Hanson on credit and when Hanson was unable to pay for those products he executed a note to PPG on February 3, 1965 for the sum of $23,983. That note remains unpaid today. Moreover, Hanson purchased most of his supplies from PPG's competitors, such as Safelite and Binswanger. However, when Hanson fell behind in his payments, Safelite discontinued its business with him and Binswanger filed suit against him.

When Hanson opened his business in 1946, his was the only glass shop in the Marshall area. However, in 1952, a new company named Martex Glass Company (hereinafter referred to as Martex) started business in Marshall and became a competitor of Hanson. From that time on, Hanson's sales and profits steadily declined and thereafter in 1956 Hanson suffered a net loss of $2,874. From 1956 until Hanson went out of business in 1968, he suffered a net loss in each of those

thirteen years except for small net profits of $613 in 1958 and $204 in 1964.

In 1963 Martex' sales had climbed to $250,000, while Hanson's sales were down to $42,000, which resulted in a net operating loss for Hanson of $13,759 in that year. Moreover, Hanson suffered a crushing blow in that year when his business establishment was hit by a disastrous fire on October 29, 1963, for which Hanson was admittedly under-insured.

At the trial, Hanson confined his "proof" of alleged discriminatory transactions to the years 1964 and 1965. That tactic is explained by the fact that the Statute of Limitations commenced to run on April 10, 1964 and because Hanson purchased virtually nothing from PPG in 1966, 1967 and 1968.

Hanson's total purchases by year from all suppliers and his total purchases from PPG were as follows:

Year	Hanson's Total Purchases From All Suppliers	Hanson's Total Purchases From PPG	Hanson's Purchases From PPG As A Percentage Of Hanson's Total Purchases
1968	$ 6,777	$ 442	6%
1967	$ 5,227	$ 39	1%
1966	$ 7,626	$ 192	2%
1965	$18,795	$3,493	18%
1964	$17,589	$4,573	26%

The above table clearly shows that Hanson annually purchased 74%, 82%, 98%, 99% and 94% of his products from suppliers other than PPG. Furthermore, Hanson purchased those products from PPG's competitors at the same low prices which Hanson claimed to be discriminatory.

Accordingly, this is simply a case which primarily involves the oft-litigated defense of meeting competition. Here, however, the meeting competition facts were not only conclusively proved by PPG but also the existence of those facts was admitted by Hanson.

It is PPG's contention that the judgment of the Court of Appeals can be sustained on the ground of meeting competition alone, or on any one of the other grounds set forth by that Court.

3. Meeting Competition

At the trial, the facts concerning the meeting competition issue were proved in an incontroverted and conclusive manner, as follows:

a. PPG obtained from its customers hundreds of invoices and price lists issued by PPG's competitors to those customers. Those invoices and price lists showed the low prices at which PPG's competitors were selling their products to those customers and which prices PPG was required to meet. In total, PPG introduced over 10,000 exhibits at the trial and the bulk of those exhibits related to the meeting competition defense.

b. PPG produced witnesses at the trial (including the owner of Martex) who testified that they were purchasing products from PPG's competitors at the low prices shown on the above-mentioned invoices and price lists.

c. Hanson admitted on the stand (when confronted with invoices from PPG's competitors to him) that he regularly purchased products from PPG's competitors at those low prices.

d. Hanson's attorney never attempted to disprove that PPG's competitors were selling their products in the area at those low prices; in fact, he affirmatively elicited such testimony from the witnesses.

In view of the above-mentioned evidence, it is not surprising that Hanson states on page 3 of his Petition to this Court that the evidence concerning the meeting competition defense is "not disputed factually."

In spite of the undisputed factual evidence concerning the meeting competition defense, Hanson nevertheless requests that this Court grant a writ of certiorari. However, Hanson's contention is without merit.

Hanson asserts in his petition that PPG did not show "good faith" in meeting competition. However, that assertion flies directly in the face of the established law on the subject. That law was stated by this Court in *Federal Trade Commission v. Staley Manufacturing Company,* 324 U.S. 746 (1945), at pages 759-760:

> "We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

In view of the undenied, uncontradicted and undisputed evidence of the "existence of facts" concerning the prices at which PPG's competitors were selling their products in the area, it is clear that PPG complied with the applicable law when PPG met those lower competitive prices.

Hanson also asserts in his Petition that Hanson was "singled out and alone denied the lower prices" (p. 6 of Hanson's Petition). That statement is totally inaccurate. The overwhelming majority of PPG's products were sold exactly in conformity with PPG's Published Price Lists, and the lower priced sales that PPG did make were made specifically to meet the equally low prices of PPG's competitors.

Hanson's Petition criticizes the Court of Appeals for its holding that the meeting competition defense can be used to gain a new customer as opposed to retaining an old customer. However, it is not clear from the opinion as to the customer to whom that Court is referring. Certainly that Court could not be referring to the many customers to whom PPG had been selling for many years, that is, the customers who were solicited by Hanson on behalf of PPG when Hanson worked for PPG from 1927 to 1946, and which customers were continued to be solicited by the other PPG salesman who replaced Hanson. On the other hand, if the Court of Appeals is referring to Martex, it should be noted that Martex was a new company that started in business several years after Hanson opened his business and therefore Martex was not only a new customer but Martex was also a new company. Moreover, PPG was never able to obtain any more than 10% of Martex' requirements. Furthermore, if the Court of Appeals is referring to other customers who purchased from PPG's competitors, the record is clear that PPG lowered its prices in order to meet the equally low prices of those competitors.

It is PPG's contention that the judgment of the Court of Appeals can be sustained on the basis of meeting competition alone.

4. Availability

In Hanson's Petition, he asserts that competitive injury cannot be negated merely because Hanson had comparable products available to him at the same low prices that PPG was attempting to meet. However, Hanson fails to point out that the case at bar goes far beyond the concept of availability because Hanson was, in fact, actually purchasing from 74% to 99% of his requirements from PPG's competitors at the low prices which he claims to be discriminatory. (The table showing Hanson's purchases appears *infra* at page 5 of this Brief.)

It is PPG's contention that the judgment of the Court of Appeals can be sustained on this basis alone.

5. Causation and Damages

At the trial, Hanson limited his "proof" of discriminatory transactions to the years 1964 and 1965 and he restricted that evidence to glass products only. He then offered his profit and loss figures for each year that he had been in business from 1948 through 1968 and he then rested. That table appears *infra* at page 3 of this Brief, and it clearly shows that Hanson's operations were unprofitable for the last thirteen years that he was in business. Hanson did not offer any evidence showing that he lost any specific sales or any specific profits because of any alleged discriminatory transactions. Furthermore, Hanson offered absolutely no evidence that any competitor of his obtained any sales that Hanson lost. Moreover, Hanson failed to offer any documents that would support any such losses. In other words, there is not a scintilla of evidence in

the entire record that connects any alleged discriminatory transaction with any injury to competition or with any injury to Hanson, nor is there any evidence which shows any amount of injury to Hanson.

Furthermore, the mere listing by Hanson of his profits and losses for his entire business operation was completely inadequate to prove damages in view of the widely diversified nature of his business. At the trial, Hanson limited his proof to glass products only, but he sold many other products which he could not buy from PPG because PPG did not sell those products, such as: wallpaper, picture frames, art supplies, canvas, caulking, roofing materials, rug shampoo and rug shampooers.

The facts of this case clearly show that Hanson went out of business simply because he was a poor businessman and not because of anything that was done by PPG. That fact is clearly demonstrated by the other points raised in this Brief and by the continuous decline in Hanson's sale of products that were not even sold

by PPG. For example, following is a table showing Hanson's sales of wallpaper:

Year	Hanson's Wallpaper Sales
1948	$12,192
1949	$11,157
1950	$12,106
1951	$ 8,925
1952	$10,664
1953	$ 9,423
1954	$ 9,606
1955	$ 8,935
1956	$ 7,232
1957	$ 4,383
1958	$ 3,575
1959	N.A.
1960	$ 3,000
1961	$ 2,130
1962	$ 1,569
1963	$ 700
1964	$ 302
1965	$ 404
1966	$ 216
1967	0
1968	0

From those facts, it is clear that the Court of Appeals did not "substitute its opinion for that of the jury." On the contrary, the Court of Appeals reached the only conclusion available in view of the total absence of any evidence that would support Hanson's contentions that PPG caused him injury.

It is PPG's contention that the judgment of the Court of Appeals can be sustained wholly on the basis that Hanson failed to prove any causation or any damages.

6. Hanson's Failure of Proof and De Minimis

In addition to the points previously raised in this Brief, PPG has constantly maintained throughout this litigation that Hanson failed to prove the fundamental elements that must be established in order to make out a Robinson-Patman Act case and that any alleged discriminatory sales or any price differences were of a *de minimis* nature.

For example, the Court of Appeals cites a transaction wherein Hanson purchased a product known as Factrolite that was cut to the small, odd size of 19-3/8" x 23", at a price of 62 cents per square foot, for a total cost of $6. Hanson compared that purchase with a sale to another customer for the same product in a large standard size (or stock sheet) of 32" x 132", at a price of 35 cents per square foot, for a total cost of $20. Both the price charged to Hanson and the price charged to the other customer conformed exactly with PPG's Published Price List and each price was equally available to either customer. However, Hanson elected to purchase his Factrolite in a size that was specially cut to the specific size opening for which he intended to use it and therefore he decided to pay the higher "cut size" price that was set forth in PPG's Published Price List, whereas the other customer chose to take the large standard "stock sheet" at the lower price.

It is standard practice in the glass industry to sell and to publish different prices for standard "stock sheets" than for custom "cut sizes" and the record in this case contains many documents as well as live testimony on that subject.

Moreover, it is important to note that both of the above-mentioned Factrolite sales total only $26 and that the $6 sale to Hanson was the only purchase that Hanson ever made of Factrolite during the entire statutory period. Manifestly, those Factrolite sales are so small that they clearly can have no substantial effect upon interstate commerce and, therefore, they are *de minimis*.

Furthermore, Hanson's major complaint involved his purchases of autoglass. However, if Hanson had received the lower price which he claimed to be discriminatory on all of the autoglass that he purchased from PPG throughout the entire statutory period, the total price differential over that period of time would have aggregated the grand total of $140. Certainly a total price differential of $140 throughout the entire statutory period is clearly *de minimis*.

PPG has continually maintained (a) that Hanson has failed to prove the fundamental elements of a Robinson-Patman Act violation, (b) that the meeting competition defense has been undeniably proven, (c) that Hanson actually purchased from 74% to 99% of his supplies from PPG's competitors at the low prices which he claimed to be discriminatory, (d) that Hanson failed to prove causation, (e) that Hanson failed to prove any damages, and (f) that the doctrine of *de minimis* is applicable in this case. Accordingly we strongly contend that the judgment of the Court of Appeals can be sustained on any one of those bases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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Copies of the foregoing Brief were served on Petitioner's Attorneys, Jones, Jones & Baldwin, P. O. Drawer 1249, Marshall, Texas, by airmail, on December 10, 1973.